No. 12950.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

North Umberland Mining Company, a Corporation,

Appellant,

vs.

Standard Accident Insurance Company, a Corporation,

Appellee.

APPELLANT NORTH UMBERLAND MINING COMPANY'S OPENING BRIEF.

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Jurisdiction.

Jurisdiction to review the judgment of the court below is conferred by Title 28, Section 225, of the United States Code. The District Court had jurisdiction by reason of Sections 1332 and 2201, Title 28, of the United States Code, because North Umberland Mining Company, appellant, was a resident and citizen of the State of Nevada, and appellee, Standard Accident Insurance Company, was a citizen and resident of the State of Michigan and the amount in controversy exceeds $3000. [Tr. pp. 3, 4, 9.]

Statement of the Case.[1]

This cause in one of its aspects was determined by this Court in an opinion reported in 167 F. 2d 918.

This litigation began with a controversy over which public liability insurance policy covered the liability of one George White for the death of two persons caused by the operation of an automobile driven by said White, that is whether it was the policy of plaintiff and appellee, Standard Accident Insurance Company of Detroit, or that of defendant, Home Indmenity Company of New York. (Standard Accident Insurance Company of Detroit will hereinafter be referred to as Standard, and Home Indemnity Company of New York will hereinafter be referred to as Home.)

Prior to the accident White owned a Packard automobile and carried a public liability insurance policy with Standard. This policy insured White while driving the Packard or any other car with the permission of its owner against liability for any personal injuries or death to persons by the operation of the Packard automobile or such other automobile. The Standard policy provided by way of exception or proviso that if while driving such other automobile, while the Packard was temporarily out of service, there was other insurance which was valid and *collectible and available* to White, then the insurance provided by the Standard policy was excess insurance. [Int. Ex. 1, Conditions 11 and 13, Tr. p. 57.]

Prior to the accident and subsequent to the issuance of the Standard policy to White, intervener, North Um-

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[1]All facts are admitted and uncontradicted. [Complaint in intervention, pars. VI, VII, VIII, IX, X, XI; answer thereto, par. I, Tr. pp. 4:7, 9; Stipulation pp. 50-52; Opinion 169 F. 2d 918.]

berland Mining Company, the owner of a Lincoln Zephyr automobile, secured a policy of liability insurance covering the Lincoln Zephyr automobile from Home. This policy covered the intervener and any person driving the Lincoln Zephyr with the intervener's permission. The policy further provided as a condition precedent that no action would lie against the company unless all of the conditions of the policy had been fully complied with and the amount of the insured's obligation to pay shall have been finally determined. [Int. Ex. 2, Condition 6, Tr. p. 61.]

At the time of the accident above referred to White was driving the Lincoln Zephyr automobile belonging to intervener, North Umberland Mining Company.

Home after the accident maintained that White was not covered by the terms of its policy because White had failed to comply with one of the conditions precedent in the policy, namely, the condition that he cooperate with the company, and for that reason denied liability.

Thereupon Standard commenced a declaratory relief action in the court below against Home, White and the personal representatives of the two persons who were killed in the accident above mentioned. (These personal representatives had previously commenced actions in the Superior Court of the State of California, in and for the County of San Diego, against White and intervener, North Umberland Mining Company, as the owner of the Lincoln Zephyr.)

At the trial of the issues between Home and Standard the District Court held that White had cooperated and that Home was liable under its policy. Home appealed,

and this Court reversed the trial court in its opinion reported in 167 F. 2d 918.

Pending said appeal the actions brought against White and intervener, North Umberland Mining Company, were reduced to judgments, said judgments being rendered against White and North Umberland Mining Company jointly. [Complaint in Int. par. XI; answer thereto par. I; Tr. pp. 7, 9.]

These judgments were satisfied for and on behalf of intervener, North Umberland Mining Company, White contributing nothing on account thereof.

Upon the coming down of the mandate after the decision in 167 F. 2d 918, intervener, North Umberland Mining Company, filed its petition in intervention in the declaratory relief action against White and Standard to have it declared that White was liable to intervener, North Umberland Mining Company, under Section 402(c) of the Vehicle Code of the State of California which gives the owner of an automobile the right of subrogation against the operator for any amount which the owner has paid as a result of the negligence of such driver and to have it declared that Standard was liable under its policy to White.

The court below gave judgment for intervener, North Umberland Mining Company, against White but declared that Standard was liable to no one under its policy, because that insurance was excess insurance, the Home policy being collectible insurance on the day of the accident. [Tr. pp. 35, 36.]

Questions Involved.

Standard maintained, and the District Court held, at the trial between Standard and intervener, North Umberland Mining Company, that the insurance of Standard became excess insurance and not primary insurance not later than the time of the accident [Tr. p. 32], thereby holding that the insurance afforded by Home became collectible and available prior to the accident whether White complied with the conditions precedent contained in Home's policy or not or whether the amount of White's liability to pay had been finally determined. Condition 6 of Home's policy reads as follows: "No action shall lie against the company unless, *as a condition precedent thereto,** the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall *have been finally determined either by judgment* against the insured after actual trial *or by written agreement of the insured, the claimant and the company.*" [Tr. p. 61, Int. Ex. 2.]

Intervener, North Umberland Mining Company, maintained that the Home policy never became available or collectible insurance because the conditions precedent above referred to had not been complied with and that therefore the Standard policy never became excess insurance and at all times remained primary insurance, and that in any event it could not be determined from the terms of Standard's policy when, if ever, Standard's insurance became excess insurance.

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*Emphasis ours unless otherwise indicated.

The trial court on this issue found as follows:

> "That the insurance afforded by the policy of plaintiff, Standard Accident Insurance Company of Detroit, was and now is solely excess insurance over and above a sum equal to the limits of the insurance afforded to the defendant George White by the policy of Home Indemnity Company of New York, and which lattter insurance *was valid and collectible and available to George White at the time of said accident.*" [Tr. p. 33.]

It was stipulated at the trial of the issues raised by intervener's petition in intervention and Standard's answer thereto that the facts recited in the opinion of this Court and reported in 167 F. 2d 918 should be considered as evidence by the court in that proceeding. [Tr. p. 50.]

Appellant maintains on this appeal that the District Court erred in holding that the insurance afforded by Standard's policy was excess insurance at the time of the accident and in declaring by its decree that Standard is not obligated to anyone under the terms of its policy and in not finding that Standard was the primary insurance carrier for White and liable to reimburse intervener for the money laid out by it in satisfying the judgments against White. (Intervener as owner of the Lincoln was liable up to $10,000.00 under Section 402 of the California Vehicle Code.)

Manner in Which Questions Raised.

These questions were all raised by intervener's petition in intervention and Standard's answer thereto. [Tr. pp. 7, 8, 9, 11, 12.]

Specifications of Error.

1. The District Court erred in declaring that plaintiff, Standard Accident Insurance Company of Detroit, was not obligated to anyone under the terms of its policy.

2. The District Court erred in holding that the insurance afforded George White by the policy of Home Indemnity Company of New York was valid and collectible and available to George White at the time of the accident.

3. The District Court erred in not declaring that Standard Accident Insurance Company of Detroit was obligated to George White in the sum of $8,750.00, together with interest thereon at the rate of seven percent per annum from and after January 19, 1948, under the terms of its policy.

4. The District Court erred in not holding that the insurance afforded by Standard Accident Insurance Company of Detroit by the terms of its policy insuring George White was at all times primary insurance and at no time ever became excess insurance.

ARGUMENT.

The Facts.[2]

The relevant controlling facts material to the issues briefly stated are as follows:

George White on September 29, 1945, owned a 1942 Packard automobile. On that date Standard issued to White its automobile bodily injury liability policy insuring George White against liability for damages caused by bodily injury including death arising out of the ownership or operation of said 1942 Packard automobile. The policy further provided that in the event the Packard automobile was being repaired White would be protected by the policy while he was driving a substitute automobile with the permission of its owner. Thus, Standard was White's primary insurer while driving the Packard automobile owned by him or while driving a substitute automobile.

By way of exception and proviso the Standard policy provided as follows:

> "provided, however, the insurance under Insuring Agreements VII and VIII *shall be excess insurance over any other valid and collectible insurance available to the insured,* either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under either or both of the insuring agreements." [Tr. p. 57.] (Insurance agreement VIII above referred to covers driving of substitute automobiles.)

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[2]As stated in footnote 1, the facts are all admitted and uncontradicted.

The Standard policy covered a period commencing September 29, 1945, and ending September 29, 1946.

On December 2, 1945, intervener, North Umberland Mining Company, was the owner of a Lincoln Zephyr automobile. On that date Home issued to intervener and others its liability policy for a period commencing December 2, 1945, and ending December 2, 1946, which policy insured intervener or anyone driving the same with the permission of the owner against damages caused by the injury or death of any person or persons caused by the operation of said automobile. This policy specifies that,

> "*no action shall lie* against the company *unless as a condition precedent thereto the insured shall have fully complied with all of the terms of this policy nor until the amount of the insured's obligation to pay shall have been finally determined* either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company." [Tr. p. 61.]

On July 20, 1946, White's Packard automobile was under repair, and with the consent of intervener White was driving the Lincoln Zephyr automobile owned by intervener and while so driving said automobile he ran over Claude McLester Lee and Leana Mae Osborne Lee, and as a result of the injuries sustained in said collision the two persons last mentioned died.

Home maintained that White failed to comply with the condition precedent that White cooperate, and de-

nied liability. This court held in a comprehensive opinion that White had failed to cooperate and therefore Home was not liable under its policy. (167 F. 2d 918.) The personal representatives of Claude McLester Lee and Leana Mae Osborne Lee commenced actions in the Superior Court of the State of California, in and for the County of San Diego, against George White and intervener, North Umberland Mining Company, for their wrongful deaths. White was sued as the operator of the vehicle and intervener as the owner and therefore liable under Section 402(2) of the California Vehicle Code which imputes to the owner of a vehicle the negligence and liability therefor of a person driving such automobile with the owner's consent. [Tr. pp. 5, 6, 9.] (These facts are all admitted by the pleadings.)

Thereafter judgments were entered in said actions against White and intervener in sums aggregating $8,-750.00, and these judgments were satisfied for and on behalf of intervener, White contributing nothing. [Tr. pp. 7, 52.] It was stipulated that the facts concerning the satisfaction of the judgment alleged in the petition in intervention were true. [Tr. p. 52.]

The trial court held that White was liable to intervener for the amounts of the judgments under Section 402(d) of the California Vehicle Code, but that Standard was liable to no one under its policy. [Tr. p. 35.]

A. Standard's Policy Insuring George White Was Always Primary Insurance and Never Became Excess Insurance.

(1) A Reasonable and Fair Construction of the Controlling Provisions of Standard's Policy Insuring White and Home's Policy Insuring Intervener Leads to One Conclusion and That Is That Standard's Insurance Never Became Excess Insurance.

The decision on this appeal turns on the question when, if ever, did the insurance afforded by the Home policy become "valid and collectible insurance available to" George White. It is our position that the controlling provisions of the Home policy and the Standard policy fairly construed leads to one logical conclusion and that is that the Standard insurance never did become excess insurance.

The Standard policy insuring White's Packard and insuring White as well when he was driving another automobile while the Packard was temporarily out of use provided as an exception to such insurance that it became excess insurance only in the event that there was available to White other collectible insurance. Standard contends, and the trial court found, that the Home policy constituted collectible insurance either before the happening, or at least by the time of the happening, of the accident. This position flies in the face of the express provisions of the Home policy.

The Home policy provides to quote from the opinion of this court reported in 169 F. 2d 918, as follows:

> "The appellant's policy (referring to the Home policy) specifies that 'No action shall lie against the company unless, as a condition precedent thereto, the

insured shall have fully complied with all the terms of this policy.' There is nothing contrary to public policy in this provision, and it should be enforced according to its terms.

"Under the Civil Code of California, a condition precedent is given the same force as that indicated in the policy that we are now considering. Section 1439 provides in part:

" 'Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; * * *.' "

But in addition, the Home policy contains another condition precedent that must be complied with before an action will lie upon the policy, namely, that no action shall lie until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

At the time of the accident none of these conditions had been met. This court, in referring to the conditions contained in the Home policy, quoted from *Whittle v. Associated Indemnity Corp.*, 130 N. J. L. 576, 33 A. 2d 868, 869, as follows:

"Was a condition precedent of the policy unfulfilled by the assured? If it was then, if the insurer so chooses and it did so choose, the policy is at an end * * *, for 'there has been a failure to fulfill a condition upon which (insurer's) obligation is dependent.' "

And further quoted from the *Coleman* case as follows:

> "And if the "insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss.' * * * In short, the law does not make a better contract for the parties than they chose to make for themselves."

How can it be said that insurance is collectible before the insured under the policy has met and complied with the conditions precedent making the company liable under the policy?

Moreover, Home never became liable to White under its policy, and the policy was never therefore collectible by White because White failed to comply with the co-operative condition of the policy. (169 F. 2d 918.)

(2) The Holding of the Trial Court That Standard's Insurance Became Excess Insurance Does Violence to Every Principle of Construction Applicable to Insurance Policies.

The Standard policy is indefinite as to when other insurance is deemed to be available and collectible, and for that matter does not define collectible at all. The provision in Standard's policy, moreover, is an exception or proviso, the clause reading in part as follows:

> "Provided, however, the insurance under insurance agreements VII and VIII shall be excess insurance over any other valid and collectible insurance available to the insured * * *." [Int. Ex. 1, Tr. p. 57.]

The draftsman of the Standard policy, if he had so desired and the company, if it had so desired, could have

made plain and explicit what they left uncertain and ambiguous. The best that can be said of this provision of Standard's policy is that it is reasonably open to two constructions. One construction is that the policy can be construed to mean that Home's insurance became collectible some time prior to the accident (which we, of course, emphatically deny) and the other is that it did not become collectible until all of the conditions precedent contained in Home's policy had been complied with.

Thus, it follows that the decision of the trial court flies in the face of settled rules of construction relating to insurance contracts.

The first of these rules is that where two insurance companies are trying to avoid liability for the same risk, the court will not construe the policies so as to make neither liable. (*Zurich General Accident and Liability Insurance Company v. Clamor* (7 Cir.), 124 F. 2d 717.) But this is exactly what the lower court did in holding that Standard's insurance was excess and not primary insurance at the time of the accident and in holding that Standard was liable to no one under its policy.

Another rule is that exceptions in insurance policies are to be construed strongly against the insurer and in favor of the insured and if susceptible of two meanings, the one more favorable to the insured is to be adopted. (*Mah See v. North American Accident Insurance Company,* 190 Cal. 421, 424, 213 Pac. 42.) The trial court's judgment violated this rule. The provision in the Standard policy undertaking to make the insurance under its policy excess insurance is clearly an exception and an exception to limit the risk assumed by Standard.

Another rule is that indemnification of the insured should be affected rather than defeated. (*Glickman v. New York Life nsurance Company,* 16 Cal. 2d 626, 635, 107 P. 2d 252, 256.) The decision of the District Court defeats rather than affects indemnification in the case at bar.

Another rule is that an insurance carrier is bound to use language as to make its exceptions and provisions of its contract clear to the ordinary mind, and in case it fails to do so any uncertainty or reasonable doubt is to be resolved against it. (*Pacific Heating and Ventilating Co. v. Williamsburg Fire Insurance Company,* 158 Cal. 367, 370, 111 Pac. 4.) Standard could have made its policy clear and explicit in this regard, but it deliberately failed to do so.

The rules of construction just above stated have all been collected and applied to automobile liability policies in *Read v. Pacific Indemnity Co.,* 101 A. C. A. 177, 225 P. 2d 255.

The late Honorable J. F. T. O'Connor, the Judge who presided at the first trial of this cause upon the coming down of the mandate and speaking of the position advanced by Standard and adopted by the trial court on this appeal had this to say:

> "All of these theories, however, fairly consistent among themselves, seem fantastic to the court, and not worthy of the court's consideration, for such a construction would not be in accordance with the clear provisions of the policy of the Standard if the policy, relative to the point involved, is to be construed literally. It says that this 'primary' insurance

'. . . *shall be excess insurance over any other valid and collectible insurance available to the insured.*'*

"Having in mind that an insurance policy is a contract and that the intendments thereof are to be interpreted most strongly in favor of the assured, particularly where the contract is drawn up by the insurer, this court would naturally assume, without judicially deciding this point at this time, that the provision that the insurance of White in the Standard 'shall be excess insurance over any other valid and collectible insurance available to the insured' means only upon the actual payment of any claim in this case by the Home up to the limits of its liability; and that if, for any reason, the Home did not pay the claim, either because of insolvency, or because of a breach of a condition by White, or for any other reason, the 'primary' insurance in the Standard would not become 'excess' insurance, and . . .

"If the Standard wanted its policy to be interpreted according to the present contention of its counsel, it seems to the court that it would have been an easy matter to have used appropriate language to that effect. The present analysis of this policy provision would appear to reduce the Standard's contention to a '*reductio ad absurdum.*' "

This analysis by Judge O'Connor is sound, and it is submitted should be followed by this court.

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*Emphasis the Court's.

Conclusion.

The judgment of the lower court should be reversed with directions.

Respectfully submitted,

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Attorney for Appellant.